

switches throughout the nation. CLECs have deployed 1,200 circuit switches, up from 65 in 1996, in wire centers serving 86 percent of the RBOCs' access lines.¹⁵³ Cable operators also are providing circuit-switched services. Currently, 17 million homes have access to circuit-switched cable telephony, up from none in 1996 and 10 million in 2002.¹⁵⁴ These CLECs and cable operators have completely bypassed the ILECs' circuit switching equipment, and the instances of such bypass continue to grow.

Intermodal competition for mass market voice services also has flourished. Technological advancements enable competing carriers to provide mass market voice services using packet — as opposed to circuit — switches over broadband transport facilities.¹⁵⁵ Traditional CLECs and IXCs (*e.g.*, AT&T, Covad, McLeod, MCI and Z-Tel), cable operators (*e.g.*, Cablevision, Charter, Comcast, Cox, Time Warner), and new VoIP-based providers (*e.g.*, Net2Phone, Vonage, voiceglo, VoicePulse, Packet8) have taken advantage of these developments and are providing voice services to both enterprise and mass market customers using packet switches and VoIP technology.¹⁵⁶ CLECs have deployed 8,700 packet switches, up from fewer than 75 in 1996.¹⁵⁷ Currently, 90 percent of American homes have access to VoIP services over broadband facilities.¹⁵⁸ These competitors also have bypassed the ILECs' circuit switching equipment.¹⁵⁹ There is wide agreement that VoIP provides comparable or even superior quality and functional-

¹⁵³ *UNE Fact Report*, §I, pp. 1-2.

¹⁵⁴ *Id.*, §I, p. 2.

¹⁵⁵ *Id.*, §I, p. 1.

¹⁵⁶ *Id.*, §I, pp. 6-8.

¹⁵⁷ *Id.*, §I, p. 2.

¹⁵⁸ *Id.*, §I, p. 1.

¹⁵⁹ In many instances, these competitors also bypass the local loop — provisioning their VoIP services over a separate broadband facility into the end-user's premises.

ity compared to typical wireless service — which is acceptable to price-sensitive customers who assign more value to the superior features that digital service can offer.¹⁶⁰

Wireless service providers are an additional source of intermodal competition. More than 97 percent of U.S. counties are served by three or more wireless operators; more than 87 percent have five or more wireless options.¹⁶¹ Wireless providers deploy their own network, including switches, entirely independent of the ILEC network. The extent of wireless competition has increased dramatically since such competition was essentially dismissed in the *TRO*.¹⁶²

As demonstrated in Section II, *supra.*, these intermodal competitors have flourished in Qwest's region, in particular, but also in all ILECs' service areas. The fact that there are facilities-based intermodal competitors providing mass market voice services, and that those carriers continue to deploy facilities and experience an ever-increasing market share without access to ILECs circuit switches, firmly establishes that the mass market voice services sector is not a natural monopoly, and that mass market switching is not a monopoly bottleneck facility. The existence of these competitors precludes a finding of impairment, since any alleged impediment associated with the lack of unbundled access to switching cannot be tied to a structural impediment that would make entry into the market wasteful.¹⁶³

¹⁶⁰ *UNE Fact Report*, §II, p. 21.

¹⁶¹ News Release, "FCC Adopts Annual Report on State of Competition in the Wireless Industry," WT Docket No. 04-111 (rel. Sept. 9, 2004); Wireless Telecommunications Bureau Report to Congress, Ninth Annual CMRS Report (rel. Sept. 9, 2004).

¹⁶² *UNE Fact Report*, § II, p. 27.

¹⁶³ Qwest notes that the D.C. Circuit reached this same conclusion, and found that there is no suggestion that mass market switches exhibit declining average costs in the relevant markets, or even that switches entail large sunk costs. *USTA II*, 359 F.3d at 569.

b. Competition Also Demonstrates that Alternatives to ILEC Mass Market Switching Exist

In addition to demonstrating that mass market voice services are not a natural monopoly market, the widespread existence of both facilities-based circuit-switched and intermodal competition also proves that competitors have alternate sources available for mass market switching. First, the existence of this vibrant competition reflects that self-provisioning is not just feasible — it is a reality. Indeed, competitors already have deployed more than 10,000 circuit and packet switches nationwide. And, self-provisioning has become an increasingly economically sound decision, since the benefits exceed the costs. Specifically, technological developments now enable carriers to provide both voice and data services using packet switches. And, carriers may use the same switch to serve both enterprise and mass market customers.¹⁶⁴ The ability to offer bundled packages of services means that there is significant revenue potential from self-provisioning. At the same time, the costs of self-provisioning have decreased. For example, new enhancements to Lucent's 5ESS switch — the most common switch in CLECs' networks — can help carriers reduce operating costs by up to 50 percent.¹⁶⁵ Packet switches are reported to be more economical still.¹⁶⁶

Further, the extensive deployment of switches by competitors also demonstrates that there are alternative sources for switching services. Competitors should also be able to secure access to switching services from cable companies, and use VoIP technology to provide voice services, either alone or bundled with other services, to mass market customers. While the Commission thus far has declined to mandate that cable companies provide access to their net-

¹⁶⁴ *UNE Fact Report*, §II, p. 38 ("The analog-line interfaces used to interface with the analog loops that serve mass market customers can be added to a switch just as easily as the digital line and trunk interfaces that serve enterprise customers").

¹⁶⁵ *Id.*, §II, p. 39.

¹⁶⁶ *Id.*

works, that regulatory decision cannot be used as a rationale to ignore these companies as potential alternative sources of switching services. The Commission may not use a situation that it has created by its own prior regulatory actions to *create* a potential impairment and then try to remedy that same impairment by imposing burdens on *other* regulated entities. If the Commission believes that cable networks are not sufficiently open, it should address that issue with narrowly-tailored regulations that are targeted to those operators as opposed to broad-based unbundling requirements on ILECs that already are making their networks available. The Ninth Circuit decision in the *Brand X* case confirms that the commission has the necessary authority to impose such regulation.¹⁶⁷ Furthermore, actual operations in the marketplace do not warrant a refusal to consider cable companies as competitive sources. Cable operators have committed to a policy of “network neutrality” which will enable customers to connect to independent VoIP providers easily.¹⁶⁸ Large cable operators such as Time Warner and Comcast already have entered into agreements to make their networks available to competitors, who can provide both high speed data and telephony services *via* VoIP.¹⁶⁹ New deals are being announced on a regular basis — AT&T recently signed an agreement with Adelphia to provide VoIP service over Adelphia’s cable network.¹⁷⁰ The Commission must assign this intermodal competition the weight to which it is entitled.

¹⁶⁷ *Brand X Internet Services v. FCC*, 345 F.3d 1120 at 1129 (9th Cir. 2003), *pet. for cert. pending. pending*. Whether or not the Supreme Court accepts certiorari in *Brand X* or not, the Commission’s authority to open cable telephony networks is firmly grounded. *Brand X* held that the Commission’s power to decline to regulate cable modem networks was limited, not that its regulatory authority was limited.

¹⁶⁸ *UNE Fact Report*, §II, pp. 2-3.

¹⁶⁹ See Section II, *supra*.

¹⁷⁰ “AT&T, Adelphia Sign Net Call Deal; the cable firm becomes the preferred provider to deliver the phone company’s VoIP service to Southland homes,” J. Granelli, Los Angeles Times, Sept. 2, 2004, p. C1.

2. The Hot Cut Issue Has Been Addressed

Only one factor served as the basis for the Commission's decision to decline to adopt an unqualified national finding of "no impairment" for mass market switching — the operational barriers associated with the hot cut process.¹⁷¹ Nevertheless, subsequent to *USTA II* the hot cut process has been effectively addressed in the context of state proceedings and commercial negotiations, and is no longer an operational barrier that would justify unbundling under Section 251.

There have been significant recent improvements by Qwest with regard to the processing of hot cut requests that address and resolve the problems that existed eighteen months ago. Qwest has developed a region-wide batch hot cut process ("BHCP") in conjunction with the CLECs in its region. The BHCP is described in detail in the Declaration of Dennis Pappas, included as Attachment 1 hereto (the "Pappas Declaration"). The BHCP represents the collective work of Qwest and CLECs to develop a process that best meets the needs of the CLECs. The BHCP allows CLECs in Qwest's region to migrate large quantities of UNE-P lines to stand-alone unbundled loops within reasonable timeframes.¹⁷² The BHCP enables Qwest to process between 25-100 hot cuts of standalone unbundled analog loops per day in a central office, and allows CLEC hot cut requests to be processed within seven business days — which is quicker than the timeframes being offered by other RBOCs.¹⁷³ Qwest also can provision loops provisioned over Integrated Digital Loop Carrier ("IDLC") systems in batches of up to 40 per day per state, for an additional price which allows Qwest to recover the cost of having to dispatch a tech-

¹⁷¹ *TRO*, 18 F.C.C.R. at 17266-67, para. 465; *USTA II*, 359 F.3d at 569 ("Though the Commission in its brief alludes to 'other operational and economic factors' that might create barriers to competition in mass market switching, the Order makes clear that the national impairment finding was based solely on hot cuts.") (internal citations omitted).

¹⁷² Pappas Declaration, p. 3.

¹⁷³ Pappas Declaration, pp. 25-26, 32-33, 40.

nician to the field to complete the necessary work associated with IDLC conversions.¹⁷⁴ Qwest's BHCP can be used to convert both existing CLEC UNE-P lines, and batches of newly-acquired customers.¹⁷⁵ In order to provide CLECs with additional flexibility, each of the Basic Installation, Coordinated Installation, and Project-Managed Installation loop provisioning services that Qwest currently offers will continue to be made available.¹⁷⁶ These options permit CLECs to more closely coordinate the hot cut process for particular loops, to migrate loops with particular configurations, or to select a specific time for a cut-over to take place.¹⁷⁷ Qwest currently provisions more than 99 percent of such coordinated cuts on time.¹⁷⁸ Qwest has voluntarily agreed to implement nearly all of the improvements contemplated by its BHCP by mid-October 2004; the remainder will be implemented by mid-year 2005.¹⁷⁹

The BHCP enables CLECs to realize cost savings and operational efficiencies that result from pre-wiring and cutting over many loops at a time in the same central office location, and make it more economic for CLECs to serve mass market customers without access to unbundled switching.¹⁸⁰ Prices for work performed under the BHCP are generally below the TELRIC price established by the state commissions for individual hot cuts.¹⁸¹ And, CLECs who sign the QPP agreement (*see* Section III.A.4) enjoy substantial reductions in batch hot cut rates.¹⁸²

¹⁷⁴ Pappas Declaration, p. 27.
¹⁷⁵ Pappas Declaration, pp. 4-5.
¹⁷⁶ Pappas Declaration, pp. 10-11.
¹⁷⁷ Pappas Declaration, pp. 5, 35.
¹⁷⁸ Pappas Declaration, p. 35.
¹⁷⁹ Pappas Declaration, p. 3.
¹⁸⁰ Pappas Declaration, p. 3.
¹⁸¹ Pappas Declaration, p. 4.
¹⁸² Pappas Declaration, p. 3.

The BHCP satisfies the batch hot cut requirements established in the *TRO*.¹⁸³ Beyond that, Qwest's BHCP also offers CLECs a superior quality of service. Qwest will continue to offer access to its current pre-ordering and ordering functionality that it provides to CLECs through various electronic interfaces and which enable CLECs to achieve real-time processing while integrating pre-ordering and ordering functions.¹⁸⁴ Qwest's OSS interfaces were thoroughly tested during Qwest's 271 process, and all 14 commissions in Qwest's region concluded that Qwest provides sufficient electronic functions and manual interfaces to allow CLECs access to all of the necessary pre-ordering and ordering OSS functions.¹⁸⁵ In addition, Qwest also will make new tools available to enable CLECs to schedule their hot cuts and to track the status of their orders. The Batch Scheduling Tool will provide CLECs with predictable delivery intervals by allowing them to select their own cutover date.¹⁸⁶ The Batch Status Tool will provide CLECs with instant access to information pertaining to the status of their hot cut requests, even days before that request is scheduled to be completed.¹⁸⁷ Qwest dedicates a team of two central office technicians exclusively to performing batch conversions outside of normal business hours to avoid interfering with other network provisioning activities.¹⁸⁸ And, it schedules portions of the hot cut process between the hours of 3:00 am and 11:00 am, in order to minimize customer disruption.¹⁸⁹ Qwest uses the Qwest CLEC Coordination Center ("QCCC") to ensure a high standard of quality in the hot cut process.¹⁹⁰ The QCCC was established in April, 2001 as part of Qwest's 271 proc-

¹⁸³ Pappas Declaration, p. 8.

¹⁸⁴ Pappas Declaration, pp. 18-21.

¹⁸⁵ Pappas Declaration, pp. 21-22.

¹⁸⁶ Pappas Declaration, p. 22.

¹⁸⁷ Pappas Declaration, pp. 22, 36.

¹⁸⁸ Pappas Declaration, pp. 25, 33.

¹⁸⁹ Pappas Declaration, pp. 33, 34.

¹⁹⁰ Pappas Declaration, p. 11.

ess to improve Qwest's loop provisioning performance.¹⁹¹ As a result of QCCC's efforts, by July, 2001, over 98 percent of the stand-alone loops ordered from Qwest were provisioned on time.¹⁹² Qwest's loop performance measurements for hot cuts in Qwest's region are approximately 97.5 percent of all commitments that Qwest made in its 271 process, and Qwest far exceeds certain of the agreed upon benchmarks, including those pertaining to commitments met on time.¹⁹³ Qwest will continue to monitor the BHCP the same way it monitors loop conversion activity today, using personnel from the QCCC.¹⁹⁴ There presently are three Performance Indicators ("PIDs") that Qwest will use to monitor its progress, including whether provisioning commitments are met on the due date, the service quality of new installations, and maintenance and repair measures including the overall trouble rate.¹⁹⁵ And, in the 271 process, Qwest, the CLECs and the state commissions in its regions created a process by which additional PIDs can be established where needed.¹⁹⁶

Qwest's BHCP is the culmination of the efforts of the consolidated forum comprised of all 14 state commissions in Qwest's region, CLECs in Qwest's region, and Qwest.¹⁹⁷ The participants in the forum all agreed that a single, uniform batch hot cut process for all states within the Qwest region would provide the most efficient and effective operating environment for both Qwest and CLECs.¹⁹⁸ The forum worked cooperatively over a period of several months.¹⁹⁹ Qwest and the CLECs were able to agree on the broad outlines of a BHCP and most of the op-

¹⁹¹ Pappas Declaration, p. 11.

¹⁹² Pappas Declaration, p. 12.

¹⁹³ Pappas Declaration, p. 14.

¹⁹⁴ Pappas Declaration, p. 46.

¹⁹⁵ Pappas Declaration, p. 47.

¹⁹⁶ Pappas Declaration, p. 47.

¹⁹⁷ Pappas Declaration, pp. 4, 24-25.

¹⁹⁸ Pappas Declaration, p. 4.

¹⁹⁹ Pappas Declaration, p. 4.

erational details, and were able to resolve most of the issues and questions presented by the CLECs.²⁰⁰ The participants reached impasse on a small number of issues,²⁰¹ but that has not slowed Qwest's progression toward full implementation of the BHCP.

Qwest engaged the independent consulting company Hitachi Consulting to assess the efficiency, seamlessness and scalability of its new BHCP. Hitachi participated in all trials of the BHCP, and observed many of the Qwest work centers, including the QCCC.²⁰² Hitachi concluded that Qwest's BHCP could handle current and expected volumes of UNE-L orders and conversion of the embedded base of UNE-P lines over the course of the transition period established by the *TRO*, even assuming that all existing UNE-P lines in affected areas would transition to UNE-L using the BHCP.²⁰³ With Qwest's offering of QPP, which does not require a hot cut, the expected volumes of hot cut conversions would likely be much lower than assumed by Hitachi.

In sum, Qwest's BHCP addresses the operational issues that previously caused the FCC to decline to adopt a nationwide finding of no impairment for mass market switching. As is noted below, the Qwest BHCP has been memorialized in the QPP offering, and it is available to all carriers on a non-discriminatory basis.²⁰⁴

²⁰⁰ Pappas Declaration, p. 4.

²⁰¹ Pappas Declaration, p. 4.

²⁰² Pappas Declaration, p. 48.

²⁰³ Pappas Declaration, pp. 7, 49. Of the initial two trials conducted by Qwest, the second trial produced far superior results to the first, since Qwest was able to conduct its second trial without interruption from observers. Qwest conducted additional trials, which produced results similar to the second trial. See, Pappas Declaration, p. 50-51.

²⁰⁴ Further, even if the Commission finds that operational barriers still exist that rise to the level of impairment, it may not require unbundled access to switching without first exploring alternative, nuanced solutions. *USTA II*, 359 F.3d at 570. See also Section III.B, below.

3. The Commission's Finding of No Impairment Should Be on a Nationwide Basis

As this section demonstrates, switching services are not geographically limited. Carriers can utilize switches anywhere within the U.S. to switch traffic, regardless of particular rate center, LATA, or state boundaries. For example, Cavalier (a CLEC in the mid-Atlantic region) serves mass market customers through UNE-L in 205 Verizon central offices in nearly 30 counties across 5 states using only 11 switches in 8 locations, and McLeod uses UNE-L with 39 switches serving 696 collocation arrangements.²⁰⁵ Indeed, there are numerous switches being used to process traffic for customers in geographically distant (often interstate) locations. Attachment 2 is an excerpt from the Local Exchange Routing Guide ("LERG") that identifies numerous switches that are located in one state and that switch traffic that is originated by or terminated to customers located in another state.

The practice of using distant switches to cover large geographic areas has been in place for decades. Since switching services are not geographically limited, the absence of multiple sources of switching in one particular geographic area or market (however defined) becomes irrelevant, since a competing carrier may lease switching facilities available in other areas to switch its traffic like any other distant switch. Since the ability to utilize distant switches effectively eliminates "meaningful differences between particular markets," a nationwide finding of no impairment is appropriate and consistent with *USTA I* and *USTA II*.²⁰⁶

In conclusion, the impairment analysis framework set out in *USTA II* militates a finding by the FCC that there is no impairment on a national basis from the lack of unbundled access to mass market switching pursuant to Section 251.

²⁰⁵ *UNE Fact Report*, § II, p. 45.

²⁰⁶ *See, USTA II*, 359 F.3d at 563; *see also USTA I*, 290 F.3d at 426.

4. Qwest's Commercially Negotiated QPP Agreements Are Dispositive Of The Issue Of Impairment In Qwest's Region

Even if the Commission declines to render a national finding of no impairment for mass market switching, *USTA II* requires the Commission to render a finding of no impairment within Qwest's region based upon Qwest's alternate offering of switching services outside of Section 251(c)(3).²⁰⁷ After extensive arms-length negotiations with individual CLECs and a CLEC consortium, Qwest has entered into four-year commercial agreements with MCImetro Access Transmission Services ("MCI") and five other smaller CLECs²⁰⁸ for the provision of "QPP" service.²⁰⁹ As described in the Declaration of William H. Campbell, included as Attachment 3 (the "Campbell Declaration"), under those agreements, Qwest will continue to provide CLECs with access to mass market switching services, including vertical features, and shared transport.²¹⁰ The QPP package also includes UNE loops that CLECs continue to purchase out of their interconnection agreements.²¹¹ QPP uses the same pre-ordering, ordering, provisioning and repair and maintenance processes that are used for UNE-P, so CLECs do not have to develop new interfaces or processes for QPP.²¹² Qwest will provide the commercial product at prices previously charged for the UNE platform through December 31, 2004.²¹³ Between January, 2005 and

²⁰⁷ If the Commission bases a finding of no impairment on the QPP agreement, a carrier executing a QPP agreement would be entitled to the transition provisions in that agreement, and carriers not executing a QPP agreement would be subject to the change-of-law provisions in their interconnection agreements. The Commission should not adopt transition rules that are more favorable than those governed by existing agreements, because that would favor carriers who have not entered into such agreements and disadvantage carriers that have done so. *See also* Section V, below.

²⁰⁸ *See* Campbell Declaration, p. 7.

²⁰⁹ Campbell Declaration, p. 2.

²¹⁰ Campbell Declaration, p. 5.

²¹¹ Campbell Declaration, p. 5.

²¹² Campbell Declaration, pp. 5-6.

²¹³ Campbell Declaration, p. 6.

January, 2007, there will be annual incremental rate adjustments.²¹⁴ In related amendments to existing interconnection agreements, Qwest is offering significant improvements with respect to the efficient and cost-effective processing of hot cut requests, including a batch hot cut process for unbundled loops at a negotiated rate significantly below current hot cut rates.²¹⁵ Qwest's new batch hot cut process is described more fully in Section III.A.2. Qwest also agreed to use the same rates for batch hot cuts of customers who are served by integrated digital loop carrier ("IDLC") even though these hot cuts require Qwest to perform substantially more work, and agreed to allow CLECs to engage in line splitting over QPP.²¹⁶ Those are terms that Qwest had declined to provide in the forum established to develop its batch hot cut process, due to the increased cost to the company of doing so.²¹⁷

Qwest's agreement with MCI was one of the first agreements to be reached between an RBOC and a CLEC addressing mass market switching post-*USTA II* and, to Qwest's knowledge, is the only such commercial agreement regarding the hot cut process. MCI is the second largest UNE-P purchaser in Qwest's region.²¹⁸ Qwest has filed the QPP agreement with the FCC pursuant to Section 211 of the Act,²¹⁹ and has posted the agreement on its website for public access and inspection. The agreement is available to other carriers within Qwest's region upon request.²²⁰ In fact, five other CLECs have signed the QPP agreement brokered with MCI and a number of other carriers are considering the agreement.

²¹⁴ Campbell Declaration, p. 6.

²¹⁵ Campbell Declaration, pp. 3, 6.

²¹⁶ Campbell Declaration, p. 7.

²¹⁷ Campbell Declaration, p. 7.

²¹⁸ Campbell Declaration, p. 2.

²¹⁹ 47 U.S.C. § 211(a); Campbell Declaration, p. 3.

²²⁰ Campbell Declaration, p. 3.

The QPP agreement benefits consumers and the CLECs who have adopted it. The agreement provides the CLECs more regulatory certainty than they have had since the Act was passed in 1996, allowing them to make rational, informed business decisions. Indeed, when MCI and Qwest reached agreement for QPP, MCI's president and chief executive stated the company's view that "good faith commercial negotiations can result in agreements that reflect the changing industry landscape and avoid complex regulatory proceedings and litigation."²²¹ And, the charges for providing the switching and loop service will not begin to increase until 2005 — and even then only in small measure, particularly for residential customers.²²² Further, with the implementation of the batch hot cut process and substantially reduced rates for batch hot cuts that MCI negotiated, the agreement unquestionably removes any operational and cost barriers that the Commission previously associated with the hot cut process. The facilitation of the hot cut process also encourages the development of real, facilities-based competition. And, while Congress, this Commission, and the public interest properly demand that CLECs migrate toward real, facilities-based competition, the agreement provides CLECs with the stability and certainty that they require in the event their business plans depend on the continued ability to lease switching services. Those CLECs are able to continue leasing switching services at commercially negotiated rates, while also getting an efficient and lower-cost hot cut process.

The agreement also benefits Qwest. It allows Qwest to keep CLECs and their end user customers on the Qwest network and retain at least a portion of the revenues it would have received if the end user had remained with Qwest.²²³ The market for telephone service is competitive, and end users have a choice of providers, including intermodal competitors, that result in

²²¹ Campbell Declaration, p. 3.

²²² Campbell Declaration, p. 6.

²²³ Campbell Declaration, p. 3.

Qwest's complete loss of the customer and associated revenue stream.²²⁴ In fact, Qwest views the CLECs as another distribution channel for marketing its services. The agreement also provides Qwest with the ability to provide additional services to CLECs, including DSL, Advanced Intelligent Network, and Voice Messaging Service, that provide enhanced capabilities not available with UNE-P, and the potential for additional revenue.²²⁵

The decision of six CLECs of varying sizes to enter into the QPP agreement demonstrates conclusively that the agreement provides a viable option for CLECs seeking to lease switching facilities from ILECs, as well as a solution to the hot cut issue related to CLEC deployment of switching facilities. Both Qwest and the CLECs had incentives, as described above, to enter into an arrangement addressing mass market switching and hot cuts. The CLECs would not have signed the agreement if it did not constitute an economically sound deal. These carriers evidently concluded that they were better off purchasing the UNE-P functionality through a mutually acceptable commercial arrangement. As part of this arrangement, each of the CLECs gave up its right to buy UNE-P pursuant to its interconnection agreement. Where parties enter into contracts that provide for the use of a network element on mutually agreeable commercial terms, those contracts demonstrate conclusively that competitors are not impaired with respect to that element. The Commission must therefore render a finding of no impairment throughout Qwest's region where such contract is available upon request to similarly-situated carriers. The requisite finding of no impairment based on the existence of these commercially negotiated agreements would provide a strong incentive to other carriers to enter into similar arrangements — a result

²²⁴ Campbell Declaration, p. 3. While the same theory applies if the customer is served by UNE-P or UNE line sharing, the TELRIC rates for those services are so low that it provide little benefit to Qwest.

²²⁵ Campbell Declaration, p. 8.

which would promote statutory goals, and which the Commission should continue to encourage.²²⁶

B. Even If Impairment Is Found, The Commission Should Not Require Unbundling

The Commission may not order unbundling of an element based merely upon a finding that CLECs would be impaired without unbundled access to mass market switching.²²⁷ In fact, the D.C. Circuit found that the Commission must consider both the benefits and the costs associated with unbundling, and may not require unbundling if there is a more narrowly-tailored measure available to address a particular barrier to entry.²²⁸ The court in *USTA II* found that the Commission should have considered more nuanced alternatives to unbundling, such as adopting a rolling hot cut process, in the context of mass market switching.²²⁹ As described above, the operational and technical impediments surrounding the hot cut process have been addressed in Qwest's region. If, notwithstanding this substantial progress, the Commission still believes that additional measures are necessary, it must tailor such measures to the specific potential harm as opposed to employing the blunt tool of general unbundling.

The Commission also must consider the other goals of the Act, and the impact that a requirement to unbundle switching would have on those goals.²³⁰ The Commission has decided to conduct this analysis under the provisions of Section 251(d)(2)'s "at a minimum" language,²³¹ and the court has upheld this approach.²³² The court found that "Section 706(a) identifies one of

²²⁶ See Section I.E.3.

²²⁷ See Section I.F.

²²⁸ *USTA II*, 359 F.3d at 570.

²²⁹ *Id.*

²³⁰ *Id.*, 359 F.3d at 572.

²³¹ 47 U.S.C. § 251(d)(2).

²³² *USTA II*, 359 F.3d at 572.

the Act's goals beyond fostering competition piggy-backed on ILEC facilities, namely, removing barriers to infrastructure investment."²³³ Maintaining a requirement for unbundled access to mass market switching would undercut this goal because of the adverse affect on CLEC and ILEC investment caused by the imposition of below-cost TELRIC rates.

The Commission has stated that the public interest is best served by UNE prices that (1) create economically rational price signals for CLECs as they choose between leasing facilities from ILECs and procuring their own, and (2) provide compensation to ILECs in amounts and intervals that will allow them to maintain and upgrade their networks.²³⁴ In comments filed in the Commission's proceeding on the TELRIC methodology,²³⁵ Qwest noted that there is evidence that low TELRIC-based rates for switching have discouraged CLECs from investing to deploy their own switches. Investment by facilities-based CLECs declined by 19% from 2000 to 2001, and by 56% from 2001 to 2002 — the same period during which their use of UNE-P exploded.²³⁶ TELRIC's resultant irrational price signals caused CLECs to select UNE-P over real facilities-based competition, thus undermining the intent of Section 706 of the Act.

Below-cost TELRIC rates have resulted in reduced investment by ILECs as well, further undermining Section 706. In its TELRIC Comments, Qwest demonstrated that TELRIC rates, as currently structured, do not enable carriers to recover the costs associated with providing services to competitors; in fact, some cost models adopted within Qwest's region allow Qwest to recover only 30% of the costs it incurs.²³⁷ Since ILECs do not recover their costs, let alone any profits, from the provision of elements at TELRIC rates, they have less revenue to use toward investment

²³³ *Id.*, 359 F.3d at 579.

²³⁴ Comments of Qwest Communications International inc., filed Dec. 16, 2003 in Docket No. WC 03-173, at 3 ("Qwest TELRIC Comments").

²³⁵ WC Docket 03-173.

²³⁶ Qwest TELRIC Comments, pp. 5-6.

²³⁷ *Id.*, pp. 3-6.

in other network components, including the deployment of broadband facilities and innovative technologies. In fact, RBOC capital expenditures declined by approximately 35% from 2001 to 2002.²³⁸ The Commission already has recognized that a requirement to provide broadband loops at TELRIC rates can discourage deployment,²³⁹ and declined to require ILECs to unbundle broadband loops based upon that concern. And, the court in *USTA II* found that the Commission is not required “to blind itself to the fact that TELRIC may itself be imperfect and may be implemented still more imperfectly.”²⁴⁰

The circumstances for mass market switching are no different. As was the case with broadband loops, requesting carriers have alternative sources for switching services, including third-party sources and viable opportunities to self-provision, and the costs of unbundling (in the form of reduced investment in infrastructure) outweigh the potential benefit (synthetic competition) from unbundling. The Commission should reach the same conclusion here as it did for broadband loops — that unbundling is not warranted.

Thus, even if the Commission finds that requesting carriers are impaired without access to mass market switching, it should conclude that the costs of unbundling outweigh any potential benefits, and that unbundling therefore is not warranted.

IV. DEDICATED TRANSPORT AND HIGH-CAPACITY LOOPS CANNOT BE CLASSIFIED AS UNBUNDLED NETWORK ELE- MENTS

As discussed above, the D.C. Circuit determined that there can be no finding of impairment when carriers have access to the network element via tariff and have been able to use the tariffed service successfully in a competitive market. For the same reasons, there can be no im-

²³⁸ *Id.*, p. 6.

²³⁹ *TRO*, 18 F.C.C.R. at 17135, para. 260.

²⁴⁰ *USTA II*, 359 F.3d at 580.

pairment finding when a network element is routinely self-provisioned or available from a third-party source.

As we discuss below, the Commission cannot find impairment, and require provision of, DS1 loops, DS3 loops, Dark Fiber (DS1 and DS3), and dedicated transport as UNEs. Competition in the provision of these network elements is alive and well and their deployment is not impeded by natural monopoly characteristics. There is widespread deployment and use of alternative fiber circuits in high-usage areas, as well as intermodal sources for these network elements, demonstrating that the loop and transport network elements cannot be assumed to have natural monopoly characteristics. Moreover, all of these network elements are readily available nationwide under special access tariffs, and special access facilities are widely used by CLECs for high-capacity loops and transport in a highly competitive market, which precludes a finding, under the *USTA II* test, that CLECs are impaired without access to them as UNEs. There are also increasingly numerous sources of intermodal competition for the provision of high-capacity service to small businesses, thereby eliminating any grounds for believing that this service is somehow dependent on the use of wireline network elements. Under these circumstances, it would be clear error for the Commission to find that CLECs are impaired with respect to high-capacity loops and transport. With respect to high-capacity loops and transport currently available under special access tariffs and in actual use, in particular, it is impossible to find that any impairment exists, and thus the Commission must bar all conversions from special access to UNEs and related attempts by those carriers using special access to use UNEs instead.

Moreover, many of the companies seeking to obtain unbundled access to high-capacity loops and transport seek them in combined form as Enhanced Extended Links or EELs, which

the current *TRO* rules²⁴¹ permit to be used for the provision of long-distance service if they are also used for local service, yet the long-distance industry is highly competitive, does not compete directly with core local exchange services, and has successfully used special access circuits instead of EELs for years. There can be no claim of impairment with respect to the long distance industry's access to EELs. In fact, the D.C. Circuit's decision in *USTA II* largely renders EELs superfluous and requires an impairment test that eliminates the opportunity of carriers to obtain UNEs for use as part of long distance service.

Despite the substantial guidance provided by the Court in *USTA II*, and the fact that a record has yet to be compiled, a majority of the Commissioners have issued statements giving the impression that they are committed to the unbundling of DS-1 loops and transport regardless of *USTA II* and any evidence that may be introduced.²⁴² In the end, however, the Commission must comply with the Court's decision and fairly apply the law and weigh the evidence. The courts have thrice vacated and reversed Commission unbundling requirements reached without regard to the facts or the law; it should not be necessary to do so yet again.

²⁴¹ As is discussed below, the existing rules, developed before the Commission recognized its obligation to consider the availability of tariffed services in conducting an impairment analysis, must be modified to take proper account of the fact that long distance services are not entitled to purchase UNEs, and that the provision of long distance service at TELRIC rates cannot constitute a reason justifying unbundling of a network element.

²⁴² See Statement of Chairman Michael K. Powell ("In the *Triennial Review Order*, I supported fully requiring incumbents to unbundle DS1 loops and transport, as did every one of my colleagues. I remain steadfastly committed to providing the key network elements to these facilities competitors in this proceeding, without which they would be impaired. Indeed, I am quite confident that we will be able to provide these elements, once we have a full and complete record, consistent with the guidance of the court. . . . I have expressed a commitment and some confidence that DS1 loops and transport will remain unbundled elements for facilities-based providers. Should the Commission adopt final rules along these lines, facilities competitors will not be subject to price increases, or special access pricing. Indeed, I expect that will be the case."); Statement of Commissioner Kathleen Q. Abernathy ("But it is fully within the Commission's power to prevent any price increases from occurring. Indeed, it bears emphasis that a clear majority of the Commission has advocated the continued unbundling of DS-1 facilities in most circumstances and has also called for issuing new unbundling rules well before the interim period ends. If we fulfill our responsibilities, as I am confident will be the case, then there will be no price increases for any DS-1 loops or transport facilities that are designated as UNEs; rather, TELRIC rates would continue to apply as they do today."); Dissenting Statement of Commissioner Michael J. Copps ("The Commission was unanimous in upholding unbundled access to DS-1 transmission facilities in the original Triennial Review Order, and . . . [t]o suggest that special access rates apply in six months and a day is not just devastating — it is, as a legal matter, wholly unnecessary.").

At a minimum, the Commission must ensure that:

1. Under no circumstances may existing, tariffed special access facilities that are actually in service be “flipped” or converted to UNEs — *i.e.*, a circuit purchased under tariff cannot be converted to UNE pricing;
2. Under no circumstances may an impairment finding, and consequent unbundling requirement for high-capacity loop or transport UNEs, be based on comparing the TELRIC and tariffed prices for such facilities;
3. Any carrier that is already purchasing high capacity loops and/or transport on a particular route will not be deemed to be impaired and given unbundled access to additional facilities on that route;
4. Any carrier that is already receiving high-capacity loops and/or transport pursuant to special access tariffs in a wire center will not be found impaired and given access to such facilities as UNEs in the future in such wire center;
5. In any wire center where high-capacity loops and/or transport are readily available pursuant to special access tariffs, those network elements will not be made available as UNEs in the future.

More generally, as explained herein, the Commission should make a national finding that the availability, and existing usage, of high-capacity loops and transport via special access tariffs, as well as from alternative sources, precludes any finding of impairment and thus bars the unbundling of these network elements henceforth.

A. Availability and Use of Transport and Loops Under Special Access Tariffs Precludes an Impairment Finding More Generally

In *USTA II*, the Court *twice* found that where providers of particular services had ready access to network elements pursuant to special access tariffs and had successfully used special access, a finding of impairment would be improper. As discussed extensively in Section I.C, the Court found that wireless carriers and CLECs could not be considered impaired with respect to network elements that they have successfully obtained and used pursuant to special access tariffs.

The Court's findings in these two sections of the decision should be dispositive. If carriers providing a given service have access to needed network elements under special access tariffs and are in fact able to use tariffed facilities as a source for those network elements in a competitive market, then all carriers providing such service are conclusively not impaired in their ability to provide their services by the lack of availability of those network elements as UNEs. The only conclusion that can be drawn from this is that the availability of network elements under special access tariffs and evidence of their successful use precludes any general finding of impairment.

The Court relied on "robust competition" in the CLEC industry, indicating that if a competitive industry (where, presumably, margins are thin and costs are important) is able to exist using special access, then that industry is not impaired by being unable to convert special access to UNEs — without any consideration of the price differential between the two. The Court was well aware that there can be a significant price difference between special access and UNEs, but the fact that competition exists even while competitors are paying special access prices "precludes" any finding of impairment.

1. Transport Is Available and Widely Used Pursuant to Special Access Tariffs

a. No Impairment as a Matter of Law

The Court's holding precludes a finding of impairment with respect to dedicated transport. All telecommunications carriers can obtain dedicated transport under special access tariffs and operate in a competitive industry (even without considering alternative sources of transport, such as fiber, which is discussed in Section IV.C below); under *USTA II*, this precludes any possibility of finding impairment. It cannot be contested that CLECs, in particular, continue to be in a highly competitive industry,²⁴³ because there is a substantial body of evidence of the CLEC industry's improving financial condition and the competitive and (as one CLEC put it) "lucrative" nature of their business.²⁴⁴ In short, the CLEC industry is at least as "robustly competitive" as it was when the Court issued its *USTA II* decision. Moreover, dedicated transport remains available through special access tariffs nationwide. Under these circumstances, CLECs are not impaired as a matter of law.

b. No Impairment from a Cost Perspective

Some carriers may nevertheless maintain that they are impaired by having to rely on special access instead of getting transport and high-capacity loops at TELRIC rates. Such arguments, however, are without merit. As discussed above,²⁴⁵ the logic of comparing tariffed rates with TELRIC prices is circular, and any such analysis would be found arbitrary and capricious.

²⁴³ *UNE Fact Report*, § I, p. 13 ("Today, the investment dollars are flowing into facilities-based competition. Cable and wireless companies continue to pour billions into their networks, to accommodate steady growth for traditional services and rapidly growing demand for new ones. . . . Every major category of facilities-based CLEC — wireline, wholesale fiber suppliers, fixed wireless, and voice-over-broadband providers — is now attracting extensive investment. Significant industry consolidation has allowed these competitors to achieve much improved economies of scope and scale. Many of these CLECs have begun to report positive earnings for the first time."); see *id.*, § I, Figure I at p. 14, Table 10 at p. 18.

²⁴⁴ See *UNE Fact Report*, § I, Table 10 at p. 18.

²⁴⁵ See Section I.D above.

And even if there were some merit to a tariff vs. TELRIC comparison for impairment purposes, a proper analysis of these rates does not warrant a finding of impairment.

The principal fallacy in typical arguments for a comparison of tariff and TELRIC prices is the incorrect assumption that all of the services for which tariffed rates are paid are services for which impairment can be found. CLECs do not use tariffed facilities solely for the local exchange service on which they base their impairment claim. They intermix local exchange and interexchange traffic on those facilities.²⁴⁶ To the extent they are acting as providers of interexchange service or exchange access, they are not impaired by having to use special access facilities at tariffed rates. And the vast majority of traffic on their special access circuits is interexchange or exchange access that is ineligible for unbundling due to that nonimpairment, rather than the local exchange traffic on which any impairment claim is based.

Consider a CLEC that pays \$1000 a month for a special access loop or transport circuit. The CLEC claims that it is impaired by paying that tariffed rate instead of, say, \$500 a month at TELRIC for the same circuit reclassified as a UNE. If the CLEC is carrying 75% interexchange traffic and 25% local exchange traffic, the vast majority of the cost savings by moving to TELRIC would benefit its provision of interexchange service, which is not impaired, instead of facilitating its provision of local exchange service. The portion of the rate reduction attributable to local exchange service would only be \$125, not the full \$500 savings resulting from the conversion to TELRIC pricing. The remainder of the cost savings does nothing to address the alleged impairment, but is a windfall benefiting the company's provision of interexchange service. Moreover, if the carrier were to obtain the UNE solely for the "impaired" local exchange service,

²⁴⁶ AT&T openly acknowledged that its impairment cost analysis was based on using a given facility to carry "all local, data, exchange access and interexchange traffic" between two points. Letter to Marlene H. Dortch, FCC, dated Nov. 12, 2002, from Joan Marsh, AT&T, filed in CC Docket Nos. 01-338, *et al.*, at 1 (*AT&T Ex Parte*).

it would have to pay \$500, which is twice the \$250 portion of the special access price that is attributable to local exchange service. Clearly the CLEC is not impaired by having to pay \$250 for the attributable portion of a special access circuit used for local exchange service, instead of paying \$500 for that same circuit as a UNE limited to local exchange service. The actual cost to the CLEC for the UNE circuit, if used only for the allegedly impaired service, would be twice as high as the cost of purchasing the same circuit under the special access tariff and using it for both local exchange and interexchange service.

It is simply not reasonable to assume, for purposes of an impairment analysis, that all of the traffic on a special access circuit is local exchange traffic. No reasonably structured, economically rational, efficient competitive carrier provides solely local exchange traffic — even if it provides only local service itself, it certainly offers access to an interexchange network to its customers. And even if a CLEC did not commingle its local and interexchange traffic on a given circuit, using separate DS1s for local and interexchange, the revenue opportunities that underlie a valid impairment analysis must take into account the carrier's business as a whole.²⁴⁷

Qwest is not suggesting that the Commission should forbid efficient use of UNEs that are lawfully procured. The Commission, however, may not designate a special access circuit as a UNE based on an impairment finding that attributes all of the cost savings between the tariff and TELRIC to the allegedly impaired service, if that service is not, at a minimum, the predominant use of the circuit. The Commission should not permit CLECs to game the impairment process to obtain special access at UNE prices for the benefit of their or their affiliates' or partners' interex-

²⁴⁷ To use the example above, assume the carrier had separate special access facilities proportionate to its local and interexchange traffic, paying \$750 for the interexchange circuit and \$250 for the local exchange circuit. If the carrier were permitted to convert its local exchange special access circuit to a UNE, the price for that circuit would be lowered to \$125, but the carrier's total cost for its circuits would only be reduced from \$1000 to \$875. The difference between the two is not of sufficient magnitude to justify a finding of impairment by any stretch of the imagination.

change services by overstating the impairment to their local exchange services that is allegedly due to the cost differential between special access and TELRIC.

2. High-Capacity Loops Are Available and Widely Used Pursuant to Special Access Tariffs

The Court's ruling also precludes a finding of impairment with respect to high-capacity loops. There is a substantial body of evidence that CLECs have been successful in providing high-capacity local exchange service to customers using special access facilities obtained from the ILEC under tariff. "Competing carriers are using special access to serve business customers of all shapes and sizes. In fact, more than 90 percent of the high-capacity loops that carriers purchase from the Bell companies, which they then use to serve their own customers, are sold as special access as opposed to UNEs."²⁴⁸ Moreover, "Competing carriers are serving approximately 64 million voice-grade equivalent lines using a combination of their own facilities and special access circuits purchased from ILECs. Competing carriers are using special access to serve all kinds of customers, in both small and large markets."²⁴⁹ Specifically, the FCC-compiled data for 2003 demonstrate that of the 170 million voice-grade equivalent lines served by CLECs, 14.5 million were residential; of the remainder, most of which were high-capacity lines, 60 million were served via tariffed special access, while only 7.8 million were served via UNEs and resale of ILEC lines combined, and approximately 88 million were served by means of the CLECs' own facilities.²⁵⁰ In other words, competing carriers use about eight times as many special access lines as UNEs; while some of the special access lines may have been purchased for interexchange service, all of these lines are equally capable of carrying local traffic,

²⁴⁸ *UNE Fact Report*, § III, p. 3.

²⁴⁹ *UNE Fact Report*, § III, p. 41; *see id.*, § I, p. 9.

²⁵⁰ *UNE Fact Report*, § I, p. 9 and nn. 20, 21.